Filed 3/19/13 P. v. Garcia CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO GARCIA, Defendant and Appellant.	A130905 (San Mateo County Super. Ct. No. SC068818)

Seventeen-year-old Ricardo Garcia shot and killed Solomon Zarate, also 17 years old, in an impulsive, gang-related altercation at a party. A jury convicted him of first degree murder and found true allegations related to Garcia's use of a gun and involvement in a criminal street gang. The trial court sentenced Garcia to life without the possibility of parole (LWOP), plus 25 years to life**.**

Garcia contends the jury was misinstructed on self-defense and on the intent required for the gang allegations. He also claims sentencing errors, including the trial court's reliance on improper aggravating factors, ineffective assistance by his attorney, and the court's misapprehension that the sentencing statute, Penal Code section 190.5, subdivision (b)[1] prescribed a presumptive LWOP term. In supplemental briefing, Garcia argues that section 190.5 is unconstitutional in light of *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*), in which the United States Supreme Court held that mandatory LWOP sentences for minors are unconstitutional and identified factors courts

[1] All further statutory references are to the Penal Code unless otherwise indicated.

must consider when deciding whether to sentence a juvenile murderer to LWOP or a lesser term.

We vacate Garcia's sentence and remand to allow the court to re-evaluate its sentencing decision as prescribed by *Miller*. We reject Garcia's remaining contentions and affirm the judgment in all other respects.

DISCUSSION

I. The Court Properly Instructed the Jury on Self-defense Principles

Garcia contends the jury instructions on mutual combat and the initial aggressor principle, as related to self-defense, were not supported by substantial evidence, and that they wrongly precluded the jury from considering self-defense and imperfect self-defense. We disagree.

A. Background

We will discuss the facts surrounding Zarate's killing in more detail in the Analysis portion of this opinion addressing the self-defense instructions. But a handwritten document that appeared to be a poem or lyrics found in Garcia's cell before trial was admitted into evidence and it generally summarizes this senseless confrontation. Garcia wrote: "I started to get myself guns and got caught with one, so I went and bought another one. This would be my last one though. One night, after a party, some drunk rival gang member started to talk shit and I let it go for awhile, but then he kept going on how he was going to get me, so the biggest, baddest and best gangster came out of me and shot him three times. He later died in the hospital."

The court instructed the jury on mutual combat pursuant to CALCRIM No. 3471, as follows. "A person who engages in mutual combat or who is the initial aggressor has the right of self-defense only if: One, he actually, and in good faith, tried to stop fighting; and two, he indicates by word or by conduct to his opponent in a way that a reasonable person would have understood that he wants to stop fighting and that he has stopped fighting; and three, gives his opponent a chance to stop fighting. If a person meets these requirements, he has a right to self-defense if the opponent continues to fight. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That

agreement may be expressly stated or implied and must occur before the claim of self-defense arose. If you decide that the defendant started a fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting." The court also gave CALCRIM No. 3472: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

Garcia objected to CALCRIM No. 3471, but not to CALCRIM No. 3472 or to other instructions given on the right to defend one's self with force.

In his argument to the jury, the prosecutor illustrated how Garcia's aggression ruled out reasonable and unreasonable self-defense. "[Prosecutor]: Defendant is the aggressor or a mutual combatant. That means he agrees to be in a conflict. He agrees to be in a fight. Do you really think this defendant is an innocent victim? Really? He sticks his nose into a gang fight." "The defendant engages in mutual combat and on a good day, that's the best you can do. If the defendant didn't seek out this quarrel with you, you know—looking for an excuse to use the gun, he certainly was fine with the fact that this conflict was gonna happen. His own cousin was trying to push him back. People were saying, 'Don't do it, don't do it.' You know? He's fine with this. He is fine. And why wouldn't he be? He's got a gun. He ain't gonna lose. But he's sure not defusing the situation either by yelling, 'F.O.P.' Somebody yells, 'Heller Street,' I'm trying to defuse the situation by yelling 'F.O.P.;' he's egging him on. He is egging him on, it ain't self-defense. On a best day, it's mutual combat. . . ." "If you find that he sought the quarrel, if you find that he was the aggressor and certainly involved in mutual combat that he had other motives, you find that, he's not entitled to self-defense. We're done now. We won't give you your license to kill. Okay? You lose your 0-0-7 if you're acting other than only to defend yourself."

B. Analysis

The interplay between self-defense and mutual combat is explained in *People v. Ross* (2007) 155 Cal.App.4th 1033, which also involved a gang-related slaying. "Like

many legal phrases, 'mutual combat' has a dangerously vivid quality. The danger lies in the power of vivid language to mask ambiguity and even inaccuracy. Here the jury was told that participation in 'mutual combat' conditionally bars the participants from pleading self-defense if either is prosecuted for assaulting the other. The 'combat' element of this rule is clear enough, at least for present purposes. It suggests two (or more) persons fighting, whether by fencing with swords, having a go at fisticuffs, slashing at one another with switchblades, or facing off with six-guns on the dusty streets of fabled Dodge City. The trouble arises from 'mutual.' When, for these purposes, is combat 'mutual'? What distinguishes 'mutual' combat from combat in which one of the participants retains an unconditional right of self-defense?" (*Id.* at pp. 1043-1044, fns. omitted.)

Parsing case and statutory law dating from the nineteenth century, the court held that "mutual" in this context means a preexisting intent to engage in combat. "Old but intact case law confirms that as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities.* The lead case appears to be *People v. Fowler* (1918) 178 Cal. 657, 671 . . ., where the court wrote, 'It has long been established that one who *voluntarily engages* in mutual combat with another must have endeavored to withdraw therefrom before he can be justified in killing his adversary to save his own life. . . . Both before and since [the 1872 enactment of Penal Code section 197] the phrase 'mutual combat' has been in general use to designate the branch of the law of self-defense relating to homicides committed in the course of *a duel or other fight begun or continued by mutual consent or agreement, express or implied.* [Citations.]' In other words, it is not merely the *combat,* but the *preexisting intention to engage in it,* that must be mutual." (*People v. Ross, supra,* 155 Cal.App.4th at p. 1045.) Thus, " 'mutual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could

reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*" (*Id.* at pp. 1046-1047; see also *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1234.)

Here, there was substantial evidence that Garcia and Zarate intended to fight. Garcia was a member of the Norteño criminal street gang and wore a red hoodie (Norteño colors) the night of the murder. Fabian Sandoval, another guest at the party, testified that Garcia and Zarate were screaming gang-related comments at each other and "throwing out their sets," i.e., naming their respective neighborhoods as a gang challenge. He described the events just before the shooting as a "gang confrontation."

Jose Zavala, Garcia's cousin, attended the party with Sandoval and testified similarly. As the party was breaking up around midnight he heard yelling and screaming from the street. Garcia and Zarate were arguing. Zarate was yelling "Heller Street," and Garcia was yelling "Fair Oaks Park" or "Fair Oaks." It sounded like a challenge, and Zavala thought the two were about to start fighting. Garcia and Zarate were surrounded by a circle of people. Some were urging them to fight and others were trying to stop them. Zarate assumed a fighting stance, with both fists closed as though ready to throw a punch, and two men with him inside the circle of spectators were urging him to fight and yelling threats at Garcia. Ignacio Zamora ("Nacho"), also a member of the Norteño gang and Garcia's friend, was telling him to "[g]o ahead kick [Zarate's] ass." Zavala tried to separate Garcia and Zarate. He urged them to leave, but to no avail.

Then, Garcia pushed Zavala aside. Zavala heard two shots and saw a flame from where Garcia was standing. As Zavala started to run he heard more shots. Zarate ran across the street and leaned against a car. Garcia ran up to him and shot him two or three more times. Zavala did not see Zarate do anything to provoke the shooting.

Eva Puga hosted the party. As it was breaking up, she saw Zarate arguing with Nacho about gangs and a past gang-related incident. Nacho "called [Zarate] out" and asked if he was still "claiming" his affiliation with a gang. Puga thought they were going to fight, so she told them to leave the property. When Nacho and Zarate walked away, Puga thought the argument was over, "like they weren't gonna do anything about it."

That was when Garcia appeared and started talking to Zarate. Garcia said "what's up?" and was "throwing up his set or whatever and [Zarate] was just telling him that, like, 'I don't know you.' " Puga believed Garcia's words were a challenge. Zarate "seemed bothered" by Garcia's actions, but not angry. Garcia "came at [Zarate] like, really aggressive," and Puga thought "they were really gonna fight this time." She tried to get in between them and break it up, but her boyfriend pulled her away.

Puga heard the first gunshot when she was about two feet from Zarate. She ran away, but turned to see what had happened. Zarate was also running away. Garcia fired a second shot and Zarate stumbled and fell. Garcia ran up to him and shot him three or four more times on the ground, from "[r]eal close. He was just, like, right on him."

Garcia's friend Vanessa Fayad knew he was a Norteño. During the party Fayad told Garcia she was going to fight another girl after the party ended. Garcia said he would back her up. When Fayad joked about it, Garcia said he was not like the other guys at the party, who were punks. He said he was "packed," meaning that he had a weapon, and lifted up his shirt and showed her a gun. Garcia also showed the gun to Carla, the girl Fayad had threatened to fight.

As the party was breaking up, Garcia went outside with Fayad to look for Carla. Nacho was arguing with Zarate. Zarate had his hands up as though ready to box and the two were yelling back and forth, "a lot of different, like, street gangs and just 'Fight,' like, basically just saying 'fight.' " Fayad also heard "Heller" and "Fair Oaks." Garcia ran towards the two men and joined the argument. Fayad heard Garcia yell "Fair Oaks." Fayad knew Garcia to be "hot-headed, just aggressive, angry," and she was afraid of a fight. Zarate rolled his sleeves up and told Garcia and Nacho, "I'll fight the two of you." Zarate's friend, Rob, was with him and was also yelling and screaming. Rob was not a gang member, but he had been in a fight at the beginning of the party.

Garcia said "You wanna fight? You wanna fight?" Then he pulled out the gun and fired one shot, paused, and fired again. After the first shot missed, Nacho told Garcia "You better shoot him" or "You better get him." Garcia yelled "It's Fair Oaks Park" as

he fired the second time. Zarate was hit by the second shot and fell as he fled. Garcia ran up to Zarate and shot him four more times as he lay on the ground.

Antonio Flores, a friend of Zarate's, was also at the party that night. Like Zarate, he belonged to the Heller Street Boys, a Crips gang, from 2004 until about 2006, but he had since moved to the other side of town and was no longer in the gang. The Heller Street boys claim the color blue and align with the Sureños against the Norteños. They frequently engage in fistfights with Norteños. Zarate liked to box with his fists, and Flores never knew him to use a weapon.

Flores also saw Garcia shoot Zarate. He testified that both of the initial shots struck Zarate at close range. Zarate fled across the street and had collapsed on the sidewalk when Garcia approached and shot him four more times from about 10 feet away. Zarate was unarmed.

There was further evidence concerning Garcia's gang affiliation and participation, but we need not belabor it here. The above testimony plainly depicts a decision to fight by two individuals affiliated with rival gangs, which then tragically escalated into homicide when Garcia decided to pull his gun. The evidence was more than sufficient to support a finding of mutual combat. There is no reasonable question that Garcia and Zarate intended, and implicitly or expressly agreed, to fight "before the claimed occasion for self-defense arose." (*People v. Ross, supra,* 155 Cal.App.4th at pp. 1046-1047; *People v. Valenzuela, supra,* 199 Cal.App.4th at p. 1234.) Accordingly, the trial court correctly instructed the jury with CALCRIM No. 3471. Moreover, although Garcia forfeited any claim of error as to the "initial aggressor" instruction in CALCRIM No. 3472 by failing to object to it at trial, we are satisfied that CALCRIM No. 3472 was also amply warranted by the evidence discussed here.

II. Garcia Forfeited His Claim Regarding CALCRIM Nos. 1401 and 736

The jury was instructed on the gang enhancement under CALCRIM No. 1401, that "If you find the defendant guilty of the crimes charged or the lesser offense of manslaughter, you must then decide whether the People have proved the additional allegations that the defendant committed that crime for the benefit or in association with a

criminal street gang. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime I should say a separate finding for each crime. [¶] To prove this allegation, the People must prove that: One, the defendant committed the crime for the benefit of or in association with a criminal street gang; and two, the defendant intended to assist, further or promote criminal conduct by gang members."

The court also read the jury CALCRIM No. 736 on the special circumstance for murder due to gang participation. The jury was instructed that "The defendant is charged with the special circumstance of committing murder while an active participant in a criminal street gang in violation of Penal Code Section 190.2(a) subdivision 22. To prove that this special circumstance is true, the People must prove that: One, the defendant intentionally killed Solomon Zarate; two, at the time of the killing, the defendant was an active participant in a criminal street gang; three, the defendant knew that members of the gang engaged in or have engaged in a pattern of criminal gang activity; and four, the murder was carried out to further the activities of the criminal street gang."

Garcia contends the street gang enhancement and special circumstance findings must be reversed because the instructions fail to articulate the required intent with sufficient clarity when the defendant is the sole perpetrator, rather than an aider and abettor. Specifically, he contends that the jury should have been instructed on the enhancement that the defendant must have intended to benefit the gang, and for the special circumstances finding that he must have intended to further the gang's activities. Garcia concedes his position "is not entirely straightforward," but maintains that its circuitry derives from the statutory language and case law.

We need not unravel the argument, because Garcia forfeited these claims by failing to raise them in the trial court. In discussing the jury charge with counsel, the court stated without objection that "[CALCRIM No.] 736 will be given." With respect to CALCRIM No. 1401, the court revised the parenthetical language, "for the benefit of, at the direction of, or in the association with a criminal street gang" by deleting "at the

direction of," because there was no evidence or claim that Garcia acted at the direction of a gang. Garcia objected to the deletion because he had elicited testimony that the killing was not "at the direction of" a gang, but he did not object to the instruction's articulation of the required intent. " ' " ' "[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general *or incomplete* unless the party has requested an appropriate clarifying or amplifying language." ' " ' " (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 364-365; *People v. Cole* (2004) 33 Cal.4th 1158, 1211; *People v. Alvarez* (1996) 14 Cal.4th 155, 223.) This principle bars Garcia's attempt to raise these contentions on appeal.

III. The Trial Court Exercised Informed Discretion When It Sentenced Garcia Under Section 190.5

Section 190.5, subdivision (b) provides that "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true . . ., who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." Garcia contends the court failed to exercise informed discretion when it sentenced him to LWOP under this provision because, as we understand his argument, it relied on improper sentencing factors. He also contends his counsel rendered ineffective assistance when he failed to object to an allegedly inadequate probation report or to the court's choice of sentencing factors. Neither contention has merit.

Garcia also argues his sentence must be reversed because the probation report "failed to address that sentencing question at all, in apparent ignorance of the fact that Mr. Garcia has been a juvenile at the time of the homicide." But, the relevant question is whether the trial court understood and appropriately exercised its discretion. While the nature and extent of information available to the court is relevant to that inquiry, alleged deficiencies in the probation report must be viewed in context of the other information before the court.

A. Background

After the verdict, Garcia filed a motion asking the court to exercise its discretion to sentence him to 25 years to life rather than LWOP. With enhancements, his lesser term would be 60 years to life in prison.

The probation report identified LWOP as the appropriate sentence. It said Garcia "committed a violent and callous criminal act and was an active validated member of a criminal street gang during the commission of the offense. The defendant has no prior criminal convictions but, had adjustment difficulties . . . . [¶] Pursuant to [California Rules of Court] Rule 4.421, circumstances in aggravation include that the crime involved great bodily harm, which resulted in the death of the victim, and the victim was particularly vulnerable, as the defendant was armed with a weapon. The defendant's prior sustained petitions as a juvenile are of increasing seriousness and his failure to reform from the Court's past efforts clearly show he is a menace to himself and society. [¶] In view of Rule 4.423, there appear to be no factors in mitigation." The probation report gave Garcia's date of birth, but did not mention or discuss any ramifications of his age at the time of Zarate's murder.

At the beginning of the sentencing hearing, the court said it had read and considered the probation report and several attached letters, as well as the defense motion. The prosecutor observed that the lesser sentence "appears to me to be 60 to life which would make the defendant eligible for parole at 77. And at first blush, that could be appropriate." But, the prosecutor explained, he believed LWOP was appropriate in the circumstances. "It seems to me that my primary concern ought to be, and the Court's concern should be as well, not just person[al] but public safety. And I believe this young man, for whatever reason, and I don't cast [aspersions] on his family, I don't know what the matter would amiss [*sic*] but he's extraordinarily dangerous. From a very early age, he's evidenced a propensity for extreme violence. [¶] The violence in this case was gratuitous. He was going around armed. I think I might have actually said to the jury he was looking for somebody to kill and found him. But for that reason, your Honor, I

believe the Court should not strike the special circumstance and should sentence in accordance with the law of life without the possibility of parole."

Defense counsel argued for the lesser term. Addressing Garcia's age, counsel argued "the notion that this 17-year-old carefully considered the consequences of his action and the notion that any 17-year-old carefully considers the reasons for and the reasons against any course of action is somewhat bewildering. And all of us who have dealt with and had our own 17-year-olds know that that concept is difficult to grasp that any 17-year-old carefully considers any conduct." Counsel also argued the lesser term was appropriate because, in his view, the evidence presented a "close call" on premeditation, deliberation, and the criminal street gang special circumstance.

The court disagreed and imposed LWOP. It explained: "We make choices throughout our lives. And sometimes, regardless of our youth, the decisions that we make may damn us for the rest of our lives. And for that, I see that [defendant] had previously had a gun, it was taken from him, he was placed on probation for that and, notwithstanding that omen, he chose to re-arm himself and come to this particular party. And with that, I think he came with this sense of empowerment. And when placed in a situation where he was in an argument, the senseless violence, to me, is that which he should and could have avoided, yet it was his choice. It was his choice to pull the weapon. It was his choice to fire the first shots into Solomon Zarate. And when Mr. Zarate turned and fell to the ground helpless, it was his choice to murder him. And with those five shots, he condemned himself to life without the possibility of parole. [¶] The aggravating factors are the great bodily harm to the victim, that the defendant was armed—even had re-armed himself over the time in a sense that he knew the dangers of carrying a weapon. He understood that he was gang-affiliated, and there's no question this is a criminal street gang. And he knew the consequences of carrying a weapon and he took advantage of those consequences on an unarmed, vulnerable victim and then pursued that victim to the point where the victim laid helpless and he shot him again and again. [¶] . . . In looking at the aggravating and the mitigating factors here and deciding, because this man is 17-years-old, whether or not he should receive a sentence of life

without the possibility of parole, and as stated forth just now in terms of the aggravating factors, pursuant to California Rule[s] of Court 4.421, the Court exercises its discretion to find the aggravating factors of such that the appropriate sentence under 190.2(a) subdivision 22 that the defendant was an active participant in which the murder was carried out, an active participant in a street gang is such that what is warranted here is life without the possibility of parole."

B. Analysis

Garcia argues the court based the exercise of its sentencing discretion on improper factors. Specifically, he asserts the court erred in considering the infliction of great bodily harm, because murder necessarily involves great bodily harm; his gang membership should not have been considered, because that was the basis for the special circumstance finding; and the court should not have considered the victim's vulnerability, primarily because Zarate was a large man, but also because his unarmed status could not be used as an aggravating factor in light of the enhancement imposed on Garcia. But, Garcia forfeited these claims by failing to object to the trial court's articulations of its sentencing decision. (*People v. Scott* (1994) 9 Cal.4th 331, 356 [complaints about the manner in which the court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal].)

Nor can Garcia show a reasonable possibility that the court would have imposed the lesser sentence had defense counsel objected to the court's statement of sentencing reasons. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694.) The court emphasized that Garcia pursued the wounded and fleeing Zarate, and shot him multiple times as he lay helpless on the sidewalk. Despite his size, then, Zarate could be considered a particularly vulnerable victim. (See Cal. Rules of Court, rule 4.421(a)(3) [vulnerable victim].) The court also emphasized that Garcia decided to obtain and carry a gun, despite knowing the dangers and having previously been on probation for gun possession. That, too, is a valid reason for the court's decision to impose the harsher sentence. [See rule 4.421(b)(1)[defendant's violent conduct indicates serious danger to society].) In addition, the court was apprised of Garcia's history of dangerous and violent

conduct. His history included possessing a knife at school, along with gang indicia and drug paraphernalia. Garcia planned and participated in a gang assault against rival gang members while in juvenile custody. He performed poorly on probation and suffered numerous referrals for violence, possession of weapons, and drug use. There was also evidence that he threatened Fayad and other potential witnesses to dissuade them from testifying against him. These were all appropriate sentencing considerations. (See rules 4.421(a)(6), 4.421(b)(2), 4.421(b)(4).) On this record, we think it unlikely that a defense objection to allegedly improper aggravating factors would have resulted in a different sentence.

IV. The Effect of *Miller*

Our conclusion that the trial court exercised its informed discretion when it sentenced Garcia to LWOP does not end our analysis. After Garcia appealed, the United States Supreme Court decided *Miller, supra,* 567 U.S. __ [132 S.Ct. 2455.] *Miller* holds that the Eighth Amendment prohibition against cruel and unusual punishment forbids laws that *mandate* the imposition of an LWOP sentence for juveniles convicted of murder. (*Id*. at p. 2469.) The court explained: "[I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Id*. at p. 2468.)

Referencing its prior discussions of juveniles' diminished culpability and heightened capacity for change in decisions barring capital sentences for minors (*Roper v. Simmons* (2005) 543 U.S. 551) and LWOP sentences for minors committed of nonhomicide offenses (*Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011]), the Supreme Court predicted that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2469].) The court emphasized that its decision "does not categorically bar a penalty for a class of offenders or type of crime . . . . *Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty*." (*Id.* at p. 2471, italics added.)

Garcia argues that section 190.5, subdivision (b) is unconstitutional under *Miller* because, as construed by several pre-*Miller* decisions, it makes LWOP the presumptive or "generally mandatory" sentence and thereby conflicts with the spirit, if not the letter, of *Miller*. (See *People v. Guinn* (1994) 28 Cal.App.4th 1130; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089; but see *People v. Siacksorn* (2012) 211 Cal.App.4th 909, 914-916 [rejecting *Guinn* in light of *Miller*].) Alternatively, Garcia contends that decisions construing section 190.5, subdivision (b) to prescribe a presumption for LWOP were wrongly decided. We need not resolve these questions, which are currently before the California Supreme Court. (*People v. Moffett* (2012) 209 Cal.App.4th 1465, review granted Jan. 18, 2013, S206771; *People v. Gutierrez* (2012) 209 Cal.App.4th 646, review granted Jan. 3, 2013, S206365.) Neither defense counsel, the prosecutor, nor the trial court referred to LWOP as the presumptive punishment in this case or gave any

indication that they viewed it as such. To the contrary, the court's explanation of its decision indicates that it balanced sentencing considerations in favor of the life term without reference to a presumption.

Nonetheless, it is necessary to remand this case for a new sentencing hearing in light of *Miller*. Since Garcia was sentenced, the United States Supreme Court's opinion in *Miller* has refocused the sentencing decision on "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller*, *supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2469].) *Miller* also instructs that life terms for juveniles will be "uncommon" and "rare." (*Ibid*.) Although the trial court here was plainly aware of and considered Garcia's age at the time of the killing, it did so without the benefit of *Miller*'s instruction and with no input from the probation officer (and almost none from defense counsel) regarding how the "hallmark features" (*id*. at p. 2468) of Garcia's youth might affect its sentencing decision. Accordingly, remand is appropriate so that the court may reconsider its sentencing choice in light of *Miller*. Whether it will reach the same or a different decision, we cannot say. *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics"—before sentencing a juvenile to spend the remainder of his life in prison. (*Id*. at p. 2471.) We remand to provide the trial court the opportunity to follow that process.

DISPOSITION

The sentence is vacated and the case is remanded for resentencing. The judgment is otherwise affirmed.

_____
Siggins, J.

We concur:

_____
Pollak, Acting P.J.

_____
Jenkins, J.